IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 967

THE AUTOCAR SALES AND SERVICE COMPANY,
Petitioner,

vs.

A. G. LEONARD, F. H. PRINCE, AND D. H. REIMERS, NOT AS INDIVIDUALS, BUT AS TRUSTEES OF THE CENTRAL MANUFACTURING DISTRICT,
Respondents.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Autocar Sales and Service Company, a New Jersey corporation, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois, entered November 21, 1945.

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

(A) Nature of the Action.

This is a complaint at law by respondents against petitioner, seeking recovery of rent under a written lease for the period from April 1, 1943 to January 1, 1944, amounting (including interest) to $9,536.10.

(B) Nature of the Pleadings.

Because the case was decided below on the pleadings, which are concise, it is necessary to examine them.

1. *Complaint.*

The respondents allege that on December 1, 1926, they entered into a lease with petitioner whereby they demised to petitioner certain real property in Chicago, Illinois, for a period of 20 years (R. 1); that petitioner covenanted to pay an annual rental of $10,700 in equal monthly installments, unpaid installments to bear interest at the rate of 7% per annum (R. 2); that petitioner entered into possession and paid the rental due under the lease up to and including the month of March, 1943, but refused to pay the rental for the period from April 1, 1943, down to and including January 1, 1944 (R. 2), and that such unpaid rental and interest thereon amount to $9,536.10, for which respondents pray judgment (R. 3).

A copy of the lease is attached to the complaint as an exhibit (R. 3 to 39).

2. *Answer.*

The petitioner admits the execution of the lease and the refusal to pay the rental for the 10 months in question (R. 39).

For its defense, petitioner alleges that shortly prior to March 11, 1943, the use of all of the property described in the lease was deemed necessary by the Secretary of War of the United States of America to be acquired for military purposes; that the Secretary of War of the United States requested the Attorney General of the United States to institute proceedings to acquire by condemnation the temporary use of the entire property described in the lease pursuant to the federal statutes in such case made and provided (R. 40); that the Secretary of War requested the condemnation of the land for a term ending June 30, 1943, with the right to extend the term for additional yearly periods thereafter during the existing national emergency at the election of the Secretary of War; that on or about March 11, 1943, the Attorney General of the United States caused to be filed in the District Court of the United States of America for the Northern District of Illinois, Eastern Division, a petition for condemnation by the United States of America against the land and against respondents and petitioner in this cause, the condemnation proceedings being known as 43 C 270; that upon the filing of the petition for condemnation, an order was entered by the District Court of the United States on March 11, 1943, condemning and taking by the United States of America, for military and other war purposes, the temporary use of all of the real property described in the lease, together with the improvements thereon and appurtenances thereunto belonging, and it was thereupon ordered by the District Court that delivery of immediate possession be made of all of the real estate described in the lease (R. 40); that subsequently, on May 1, 1943, the

United States of America and the Secretary of War served notice upon the respondents and petitioner in this cause that they had determined and thereby elected to extend the term for the use of the property described in the lease for an additional yearly period beginning July 1, 1943 to and including June 30, 1944 (R. 41); that the condemnation of the use of the property is subject to the right of the Secretary of War to extend the term of condemnation for indefinite future additional yearly periods (R. 41).

Further answering, petitioner alleges that under Article VI of the indenture of lease, the petitioner's use of the premises thereby demised was limited to the storage, sale and service of automobiles and automobile trucks, which is the business in which petitioner has been for many years and is still engaged; that the condemnation of the premises on March 11, 1943, rendered them incapable of occupation for any purpose consistent with the lease; that in March, 1943, petitioner was doing a very substantial business in the storage, sale and service of automobiles and automobile trucks, and required a building in which it could continue such business; that petitioner was then obliged to seek and obtain a new building in order to continue its business; that on March 25, 1943, petitioner purchased another building in Chicago, Illinois for $50,000, and then moved its place of business from the premises described in the lease to the newly purchased premises (R. 41). (The courts below would take judicial notice that the new building was about 7 miles from the condemned building.)

Petitioner further alleges that by reason of the aforesaid facts, it was evicted by paramount right from the entire premises described in the lease, and the relation of landlord and tenant between the parties was thereby abrogated, and the lease was terminated by operation of law; that the premises described in the lease were ren-

dered incapable of occupation for any purpose consistent with the lease, and that all liability of petitioner to pay rent ceased on March 11, 1943, the date of the order of condemnation (R. 41-42).

3. *Motion to Strike Answer.*

The respondents interposed a motion to strike petitioner's answer on two grounds:

(a) It appears from the answer that the United States of America has not condemned the property for the balance of the term, and the taking of a portion of the term, less than the whole, and for a period which will terminate before the period of the lease terminates, does not terminate the lease and does not relieve petitioner from the payment of rent (R. 42).

(b) The fact that the United States of America has the right to condemn for a longer period than that already taken is not an excuse for the non-payment of the rent (R. 42).

(C) Decision of the Issues.

The trial court (the Superior Court of Cook County, Illinois, the honorable John C. Lewe, judge presiding) sustained respondents' motion to strike petitioner's answer (R. 42-43). Petitioner elected to stand and abide by its answer, and suffered judgment for $9,536.10, the amount claimed due in the complaint (R. 43).

An appeal was prosecuted to the Appellate Court of Illinois, First District, which affirmed the judgment of the trial court (R. 45). The opinion of the Appellate Court is printed in full at R. 46-58, and is reported in 325 Ill. App. 375, 60 N. E. (2d) 457.

A certificate of importance (by which the judges of the Appellate Court certified that in their opinion the

questions of law involved in this case were of such importance that they should be passed upon by the Supreme Court of Illinois) was granted and an appeal allowed by the Appellate Court to the Supreme Court of Illinois (R. 45).

The Supreme Court of Illinois affirmed the judgment of the Appellate Court (R. 69-70). The opinion of the Supreme Court is printed in full at R. 60-69, and is reported in 392 Ill. 182 (advance sheet No. 3), 64 N. E. (2d) 477 (advance sheet No. 6).

A petition for rehearing (R. 71-74) filed by petitioner was denied by the Supreme Court of Illinois on January 17, 1946 (R. 74). Petitioner's motion to stay the issuance of the mandate was granted (R. 75), in order to enable petitioner to apply to this court for a writ of certiorari.

II.

JURISDICTIONAL STATEMENTS.

The jurisdiction of this court is invoked under section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, 43 Stat. 937 (28 U. S. C. A. sec. 344(b)).

The right, privilege or immunity specially set up or claimed by petitioner is under the Second War Powers Act of March 27, 1942, (Ch. 199, Title II, sec. 201, 56 Stat. 177, Tit. 50 U. S. C. A. App. sec. 632), which amended the Act of July 2, 1917 (Ch. 35, 40 Stat. 241, 50 U. S. C. A. sec. 171) by adding at the end thereof sec. 2, quoted in full in the appendix to petitioner's supporting brief.

On March 25, 1943, the President of the United States issued Executive Order No. 9321 (8 F. R. 3749, Tit. 50 U. S. C. A. App. sec. 632, p. 258), which is quoted in full in the appendix to petitioner's supporting brief.

The judgment of the Supreme Court of Illinois sought to be reviewed is dated November 21, 1945 (R. 69-70), and petitioner's petition for rehearing was denied January 17, 1946 (R. 74).

The nature of the case and the rulings of the courts below were such as to bring the case within the jurisdictional provisions relied on, because:

(a) Petitioner alleged in its answer in the trial court (as more fully set forth in the summary and short statement of the matter involved, *supra*) that, pursuant to the federal statute, the Attorney General of the United States, at the request of the Secretary of War, filed a petition for condemnation in the federal District Court by which the United States acquired full possession of the entire premises leased to petitioner, for the entire period during which the rent sued for accrued, for military and other war purposes (R. 40-41). Petitioner in its answer specially set up and claimed that, by reason of these facts, it is immune from the liability asserted by respondents (R. 41-42).

(b) The trial court sustained respondents' motion to strike petitioner's answer, holding as a matter of law that petitioner does not enjoy the immunity claimed by it (R. 43). On successive appeals to the Appellate Court of Illinois and the Supreme Court of Illinois, those courts affirmed the judgment.

The cases believed to sustain jurisdiction are: *Illinois Steel Co.* v. *B. & O. R. Co.*, 320 U. S. 508, 510-511; *Stoll* v. *Gottlieb*, 305 U. S. 165, 167; *Motlow* v. *State ex rel. Koeln*, 295 U. S. 97, 98; *St. Louis, Iron Mtn. & So. Ry.* v. *McWhirter*, 229 U. S. 265, 275-277; *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 293; *Eau Claire National Bank* v. *Jackman*, 204 U. S. 522, 532; *American Express Co.* v. *Michigan*, 177 U. S. 404, 406-407; *McCormick* v. *Market Bank*, 165 U. S. 538, 546-547.

The grounds upon which it is contended that the question involved is substantial are as follows:

(a) It is a matter of common knowledge that during World War II the temporary use of hundreds of large plants under leasehold was condemned by the federal government under the Second War Powers Act for military and other war purposes. It is believed safe to conjecture that the rents accruing under such leases during the period of governmental appropriation amount to many millions of dollars. It is highly desirable and important that subordinate courts, litigants and the bar have for guidance the expression of this court on the questions of public importance here presented.

(b) The hardships visited upon petitioner as a result of the judgment below are foreign to principles of American justice. While being deprived of the use of its premises, petitioner would, nevertheless, under the judgment sought to be reviewed, still be obliged to pay rent, water rates (R. 6), general taxes (R. 6), special assessments (R. 7), maintain the buildings in first class condition and repair (R. 11), water, cut and maintain the lawn and shrubs (R. 20), keep the premises insured at its own cost (R. 20), etc.

(c) While the amount of the judgment involved is $9,536.10, the ultimate outcome of this litigation will determine liability for an additional sum of $31,593.14, plus interest, being the rent for the remainder of the term not yet sued for, or a total liability of upwards of $41,000.00.

The federal question sought to be reviewed was raised in the court of first instance in the answer of petitioner to respondents' complaint (R. 40-42). The petitioner there alleged that it was immune from liability for rent by reason of the Government's exclusive appropriation of the demised land pursuant to the federal statutes. Respondents'

motion to strike petitioner's answer, which tested the legal sufficiency of petitioner's defense, was sustained by the court of first instance (R. 43), and that ruling was the sole issue reviewed and affirmed by the Appellate and Supreme Courts of Illinois.

The opinions of the Appellate and Supreme Courts of Illinois are printed in full at R. 46-58 and R. 60-69, respectively, and are incorporated by reference as a part of this petition.

III.

THE QUESTIONS PRESENTED.

1. Does the taking by the United States of America, by the exercise of the power of eminent domain, under the Second War Powers Act, of an entire parcel of leased property for temporary use, for military and other war purposes, for a definite period of 15 months, with the right to extend the period of the taking for future indefinite yearly periods, which may fall short of or exceed the remaining term of the lease, thereby rendering the property incapable of occupation for any purpose by the lessee, operate to abate the rent *pro tanto*, and to discharge the lessee from liability to the lessor for rent accruing during the period of such appropriation by the government of the use of the demised premises?

2. Does such a taking as is described in Question No. 1 constitute eviction of the lessee by paramount right and terminate the lease by operation of law?

3. Does such a taking as is described in Question No. 1 require the application of the doctrine known as "frustration of purpose" or "commercial frustration," so as to terminate the lease by operation of law?

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The judgment below is in conflict with this court's decision in *Gates* v. *Goodloe,* 101 U. S. 612.

2. If the law of *Gates* v. *Goodloe* does not control the issues, then this is a case of first impression arising under the Second War Powers Act, and the language of this court in *United States* v. *Petty Motor Co.* (consolidated cases Nos. 77-83, not yet officially reported, opinions delivered February 25, 1946), should either control the issues or be strongly persuasive for the abatement of rent *pro tanto.*

3. A substantial federal question is presented. The United States of America, pursuant to the Second War Powers Act, has condemned the temporary use of many leasehold estates throughout the country. Subordinate courts, litigants and the bar should have the benefits and advantages accruing from a judgment of this court on the issue involved. The interpretation of the effect of the federal statute in the circumstances of this case is a question of public importance.

4. Unless relief be granted petitioner, it will suffer extreme and irreparable hardships. *While being deprived of the use of its premises,* it would, nevertheless, under the judgment sought to be reviewed, still be obliged to pay rent, water rates (R. 6), general taxes (R. 6), special assessments (R. 7), maintain the buildings in first class condition and repair (R. 11), water, cut and maintain the lawn and shrubs (R. 20), keep the premises insured at its own cost (R. 20), etc.

If this court should consider that the Supreme Court of Illinois rightfully concluded that the lease was not

terminated by eviction under paramount right nor by the doctrine of commercial frustration, petitioner urges that the judgment below should still be reviewed and reversed, because it is in conflict with *Gates* v. *Goodloe,* 101 U. S. 612, in that it does not abate the rent *pro tanto.* In that event, petitioner respectfully submits that this court should grant a limited writ of certiorari, confining the review to an examination of the sole question whether the taking operated to abate the rent *pro tanto.*

J. Glenn Shehee,
Counsel for Petitioner.

Raymond F. Hayes,
Of Counsel.

(Brief in Support Follows)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

The opinion of the Appellate Court of Illinois is printed at R. 46-58, and is reported in 325 Ill. App. 375, 60 N. E. (2d) 457.

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Jurisdiction.

Jurisdiction of this court is invoked under section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, 43 Stat. 937 (28 U. S. C. A. sec. 344 (b)).

The right, privilege or immunity specially set up or claimed by petitioner is under the Second War Powers Act of March 27, 1942 (Ch. 199, Title II, sec. 201, 56 Stat. 177, Tit. 50 U. S. C. A. App. sec. 632), which amended the Act of July 2, 1917 (Ch. 35, 40 Stat. 241, 50 U. S. C. A. sec. 171). Both Acts are quoted in the appendix to this brief.

III.

Statement of the Case.

The summary and short statement of the matter involved, set forth in the preceding petition, contains the material facts necessary to an understanding of the case, and in the interest of conciseness they are not here restated.

IV.

Specification of Errors Intended to be Urged.

1. The Supreme Court of Illinois erred in failing to hold that the governmental appropriation of the land operated to abate the rent *pro tanto* and to discharge petitioner from liability to respondents for rent accruing during the period of such appropriation by the government.

2. The Supreme Court of Illinois erred in failing to hold that the governmental appropriation constituted an eviction by paramount right and terminated the lease by operation of law.

3. The Supreme Court of Illinois erred in failing to hold that the doctrine of commercial frustration is applicable to the facts.

4. The judgment below is contrary to the law and the facts.

V.

Summary of Argument.

This case involves the contentions of petitioner that the taking, by the United States of America, by the exercise of the power of eminent domain, under the Second War

Powers Act, of an entire parcel of leased property for temporary use, for military and other war purposes, near the end of a long-term leasehold, for a definite period of 15 months, with the right to extend the period of the taking for future indefinite yearly periods, which may fall short of or exceed the remaining term of the lease, thereby rendering the property incapable of occupation for any purpose by the lessee, (a) operates to abate the rent *pro tanto,* and to discharge the lessee from liability to the lessor for rent accruing during the period of such governmental appropriation; (b) constitutes an eviction of the lessee by paramount right and terminates the lease by operation of law; and (c) calls for the application of the doctrine known as "frustration of purpose" or "commercial frustration," and terminates the lease by operation of law.

ARGUMENT.

Point A.

When the United States of America, by the exercise of the power of eminent domain, under the Second War Powers Act, takes an entire parcel of leased property for temporary use, for military and other war purposes, for a definite period of 15 months, with the right to extend the period of the taking for future indefinite yearly periods, which may fall short of or exceed the remaining term of the lease, thereby rendering the property incapable of occupation for any purpose by the lessee, the taking operates to abate the rent pro tanto, and to discharge the lessee from liability to the lessor for rent accruing during the period of such appropriation by the government of the use of the demised premises.

The federal statute authorizing the condemnation referred to in the pleadings is known as Title II of the Second War Powers Act of March 27, 1942, Ch. 199, 56 Stat. 177, and is quoted in full in the appendix to this brief. It amended the Act of July 2, 1917, Ch. 45, 40 Stat. 241, which is also quoted in the appendix.

Petitioner urges that the decision of this court in *Gates* v. *Goodloe*, 101 U. S. 612, should have controlled the judgment sought to be reviewed. That case, as does the case at bar, came to this court from a state supreme court. It is the outstanding case laying down the American judicial philosophy on the question. In that case Gates, Wood & McKnight occupied a storehouse in Memphis, Tennessee, under a lease from one, Brinkley, testator of Goodloe, executed in 1859 for a term of five years. For

the stipulated rent, the lessees had executed promissory notes, payable quarterly during the whole period of the lease. On June 6, 1862, during the term of the lease, military possession was taken of the City of Memphis, and two months later General Sherman ordered that all rents for buildings which were occupied, but the owners of which had "gone South," were to be paid to the quartermaster. Brinkley, the lessor, upon the approach of the Union forces, left his home in Memphis and went within the lines of the Confederate forces, where he remained until 1864. The lessees of the storehouse were notified by the military rental agent to pay him the rents going to the lessor. They refused to recognize that order or to so pay the rents and, by reason of such refusal, were dispossessed by the military authorities. From the time the lessees were thus dispossessed until July 11, 1863, the property remained under Federal military control. After the war, the lessor sued on the rent notes and judgment was entered thereon by the Chancery Court of Shelby County, Tennessee for some $8,000.00. An appeal was taken to the Supreme Court of the State of Tennessee, which affirmed the trial court. A writ of error was then sued out from this Court to the Supreme Court of Tennessee. The question for determination by this Court was whether a lessee who was dispossessed by military authorities and deprived of the use and control of the demised premises was discharged from liability to the lessor for rent accruing during the period the lessee was deprived of possession. In reversing the Supreme Court of Tennessee, this Court held at pp. 616-617 as follows:

> "The Supreme Court of Tennessee was of opinion that the lessees were not discharged from liability upon their contract with Brinkley, by reason of the action taken by the military authorities touching the rents accruing from the property in question. That court recognized the hardship of the case upon the

lessees, but consistently with its views of the law the relief asked for could not be given.

"We are unable to give our assent to the conclusion reached by that learned court. It is inconsistent with our decision in *Harrison* v. *Myers* (92 U. S. 111), where we held that the lessee was discharged from liability to the lessor for rent of certain property in New Orleans during the period when the rents and profits arising therefrom were required by the Federal military authorities, occupying and controlling that city in the year 1862, to be paid directly to them. There is some difference in the facts of the two cases, but in their essential features they are alike."

The reasoning of this Court appears at pp. 618-619 as follows:

"The action of the military authorities in seizing the rents arising from the property which Brinkley had leased to Gates, Wood & McKnight not being then, in violation of law,—that which was done being regarded as having been done by the authority of the United States in lawful defence of the national existence against armed insurrection,—*it results, necessarily, as we think, that the lessees, when dispossessed by military authority and deprived of all future use and control of the leased property, were discharged from liability to the lessors for rent accruing during, at least, the period of such dispossession.* They were not discharged from liability for rent which had previously accrued. But since the consideration for their promise to pay rent, from time to time, was the possession and use of the leased property during the term and upon the conditions specified in the lease, and since such enjoyment and use were materially interrupted and prevented by the interference of the law, or of lawful public authority, to which both parties were amenable, the lessees, it seems to the court, ought to be protected against liability for the rent stipulated in the contract of 1859, *for the period they were thus kept out of possession and enjoyment of the property.* The events and contingencies caus-

ing that result were not such as the parties anticipated, nor such as we can suppose were in contemplation when the contract was made. Otherwise they would, it must be assumed, have been provided for in the contract.

"The conclusion thus reached is abundantly sustained by authority. Indeed, *many of the authorities would justify us in holding the action of the military authorities to have worked the dissolution of the entire contract of lease from the moment the lessees were dispossessed.*" (Italics ours.)

The period during which the lessees were dispossessed by military authority and deprived of all use and control of the leased property, was only temporary, and fell short of the full term of the lease, just as it has thus far in the instant case. The Gates lease was executed in 1859 for a term of five years. The period during which the tenants were deprived of possession was from about August 6, 1862 to July 11, 1863. The fee simple title to the leased premises was not taken by military authority, just as it was not taken in the case at bar. The tenants were merely temporarily deprived of the use and control of the leased premises for some months during the term of the lease, just as the petitioner in the instant case was deprived of the use and control of its leased premises by the government during the term of its lease.

As this Court said in referring to *Harrison* v. *Myers*, and as we now say in comparing *Gates* v. *Goodloe* with the case at bar, "There is some difference in the facts of the two cases, but in their essential features they are alike."

If anything, the instant case is stronger than *Gates* v. *Goodloe*, because there it was certain at the time of trial that the temporary occupation by military authorities had ended during the term of the lease; whereas in the case at bar the temporary occupation by the government is still

continuing and there is a possibility that it may outlast the termination of the lease by its terms on November 30, 1946.

Petitioner cited and relied on *Gates* v. *Goodloe* in both the Appellate and Supreme Courts of Illinois. Respondents' only answer to that case was, "The soundness of this decision is somewhat questionable. * * * the Supreme Court overlooked entirely the famous case of *Paradine* v. *Jane*, Aleyn 26, 82 Eng. Rep. 897 * * *." (Decided some 230 years earlier.) (R. 71-72.) Counsel for petitioner, when this cause was argued orally before the Supreme Court of Illinois, apprised that court that he was leaning heavily on it for a reversal (R. 71). The petition for rehearing again stressed the importance of this court's decision (R. 71-74). Neither of the reviewing state courts adverted to the *Gates* case in their opinions. It is submitted that the courts below fell into the same error as that committed by the trial court and the Tennessee Supreme Court in the *Gates* case. It should, in justice, be rectified by this court, as it was once before in 1879. A failure to review the instant case would result in two diametrically opposed judicial philosophies applied to analogous factual situations.

In addition to the square holding in *Gates* v. *Goodloe*, this court again, only a few days ago, employed language in *United States* v. *Petty Motor Co.* (and consolidated cases, Nos. 77-83, not yet officially reported, opinions delivered February 25, 1946), demonstrating clearly that the point presently contended for is sound law. The following is quoted from p. 6 of the opinion written by Mr. Justice REED:

> "There is a fundamental difference between the taking of a part of a lease and the taking of the whole lease. That difference is that the lessee must return to the leasehold at the end of the Government's use or at least *the responsibility for the period of the*

> *lease, which is not taken, rests upon the lessee.* This was brought out in the *General Motors* decision." (Citing *United States* v. *General Motors Corporation,* 323 U. S. 373, 380, 383.) (Italics ours.)

If the responsibility for the period of the lease, *which is not taken,* rests upon the lessee, then, conversely, by the clearest of inferences, the responsibility for the period of the lease, *which is taken,* does *not* rest upon the lessee. This latest expression of this court squares precisely with its holding in *Gates* v. *Goodloe.* It follows inevitably, therefore, that the judgment sought to be reviewed is erroneous in not excusing payment of the rent which accrued, in its entirety, during the period of the government's exclusive use.

Other cases holding that a taking of a part of leased premises operates to abate the rent *pro tanto* are *Biddle* v. *Hussman,* 23 Mo. 597; *Levee Com'rs.* v. *Johnson,* 66 Miss. 248, 6 So. 199; *Baltimore* v. *Latrobe,* 101 Md. 621, 61 Atl. 203, 4 Ann. Cas. 1005, and *Kingsland* v. *Clark,* 24 Mo. 24.

In *United Cigar Stores Co.* v. *Norwood* (1925) 208 N.Y.S. 420, 124 Misc. Rep. 488, in deciding the method to be adopted in fixing the amount of rent to be paid by the defendant after a partial taking by condemnation, the court said at p. 423:

> "By the common law, rental reserved in the lease would have been reduced in the ratio which the part taken bore to the whole. *Gillespie* v. *Thomas,* 15 Wend. 464. That rule could not be challenged as inequitable."

Gardella v. *Hagopian,* (1941) 28 N.Y.S. (2d) 250, was a summary proceeding by a landlord against a tenant to recover rent for demised premises, a portion of which was taken by eminent domain. The court held at p. 253:

> "Where a portion of leased premises is taken by force of paramount title, the tenant is entitled to a proportionate abatement of his rent. *Duhain* v. *Mermod, Jaccard & King Jewelry Co.,* 211 N. Y. 364, 105 N. E. 657, Ann. Cas. 1915 C. 404."

Nichols on Eminent Domain (2d ed.) Vol. 1, pp. 713-714, states:

> "It would seem that under such conditions it would be fairer to both parties, especially when such a large proportion of the property is taken that the tenant cannot devote the remainder to the use for which he leased the premises, either to treat the taking as a termination of the lease, or *to allow a proportional amount of the rent to be abated* and to have the damages of the respective parties assessed accordingly. (Cit. *Uhler* v. *Cowen*, 199 Pa. 443, 44 Atl. 42.)" (Italics ours.)

Point B.

When the United States of America, by the exercise of the power of eminent domain, under the Second War Powers Act, takes an entire parcel of leased property for temporary use, for military and other war purposes, near the end of a long-term leasehold, for a definite period of 15 months, with the right to extend the period of the taking for future indefinite yearly periods, which may fall short of or exceed the remaining term of the lease, thereby rendering the property incapable of occupation for any purpose by the lessee, the lessee is evicted by paramount right and the lease is terminated by operation of law.

In *Gates* v. *Goodloe*, 101 U. S. 612, referred to more fully under point A of this argument, this court held at p. 619:

> "The conclusion thus reached is abundantly sustained by authority. Indeed, *many of the authorities would justify us in holding the action of the military authorities to have worked the dissolution of the entire contract of lease from the moment the lessees were dispossessed.*" (Italics ours.)

In *United States* v. *Certain Parcels of Land, etc.*, 55 F. Supp. 257, the court, in speaking of a condemnation of the temporary use of leased property for a period of one year

under the Second War Powers Act with the right of election of the United States Maritime Commission to take the use for additional yearly periods thereafter during the existing states of war and one year thereafter, said at p. 264:

> "The termination of the lease by the action of the government in taking possession under the Second War Powers Act by this condemnation, has in legal effect terminated the lease * * *."

In *Zacharie* v. *Sproule* (1870) 22 La. Ann. 325, the United States military authorities took possession of leased property during the War Between the States, and it was held that the lessee was, from that date, absolved from all obligations to the lessor, on account of the lease; and that, in a suit to enforce payment of the rent for the unexpired lease, by the lessor, if the lessee showed a termination of the lease by the military authorities, he was discharged.

In *Bowditch* v. *Heation*, 22 La. Ann. 356, a lessee, by reason of the blockade of the Mississippi and Forts Jackson and St. Philip by the United States Navy, were prevented from using the demised property. The Supreme Court of Louisiana held at p. 356:

> "We concur with the learned judge of the district court 'that the evidence clearly shows that, owing to the blockade of the mouth of the Mississippi river by the United States Navy, and the occupancy of Forts Jackson and St. Philip by the Confederate authorities, *the defendants had not free access to the premises* leased during the time for which rent is claimed,' and that 'this amounted, in law, to an eviction from the premises, and released them from their obligation to pay rent to the plaintiff'." (Italics ours.)

The following additional authorities are cited in support of the point here contended for: *Corrigan* v. *City of Chicago*, 144 Ill. 537, 33 N. E. 746; *Yellow Cab Co.* v. *Stafford-*

Smith Co., 320 Ill. 294, 150 N. E. 670; *Cottrell* v. *Gerson*, 371 Ill. 174, 20 N. E. (2d) 74; *McDonald Co., Inc.* v. *Hawkins*, 287 Mass. 71, 191 N. E. 405; *Parks* v. *City of Boston*, 32 Mass. 198; *City of Pasadena* v. *Porter*, 201 Cal. 381, 257 Pac. 526, 53 A. L. R. 679; *Uhler* v. *Cowen*, 199 Pa. 316, 49 Atl. 77; *Dobbins* v. *Brown*, 12 Pa. 75; *Mellis* v. *Berman*, 9 N. Y. S. (2d) 553; *Chelsea Hotel Corp.* v. *Gelles*, 129 N. J. L. 102, 28 Atl. (2d) 172; *Hizington* v. *Eldred Refining Co.*, 235 App. Div. 486, 275 N. Y. S. 464; *City of New York* v. *Pike Realty Corp.*, 247 N. Y. 245, 160 N. E. 359.

There is a comprehensive note in 43 A. L. R. at p. 1176, stating the rule of law on the condemnation of leased premises, or a part thereof, as affecting the rights of landlord and tenant *inter se*. The rule is stated thus:

> "The majority view is taken that when the whole of leased premises is taken under eminent domain proceedings this terminates the lease, and the tenant is under no liability to pay the rent accruing after this event."

Petitioner submits that the facts in the instant case come within the scope of this rule. The whole of the leased premises has been taken under eminent domain. The fact that the taking is partial, temporally speaking, should not cause a modification of the rule applied to the complete taking, quantitatively speaking.

That the true test to be applied to ascertain whether the lease is terminated is, *does the taking render the premises incapable of occupation for any purpose consistent with the lease*, is the correct test, and the only fair and reasonable one, is also made clear in Nichols on Eminent Domain, (2d ed.) Vol. 1, pp. 713-714:

> "It would seem that under such conditions *it would be fairer to both parties, especially when such a large proportion of the property is taken that the tenant cannot devote the remainder to the use for which he leased*

the premises, either to treat the taking as a termination of the lease, or to allow a proportional amount of the rent to be abated and to have the damages of the respective parties assessed accordingly. (Cit. *Uhler* v. *Cowen,* 192 Pa. 443, 44 Atl. 42.)" (Italics ours.)

Point C.

When the United States of America, by the exercise of the power of eminent domain, under the Second War Powers Act, takes an entire parcel of leased property for temporary use, for military and other war purposes, near the end of a long-term leasehold, for a definite period of 15 months, with the right to extend the period of the taking for future indefinite yearly periods, which may fall short of or exceed the remaining term of the lease, thereby rendering the property incapable of occupation for any purpose by the lessee, the doctrine known as "frustration of purpose" or "commercial frustration" is applicable, and terminates the lease by operation of law.

Gates v. *Goodloe,* 101 U. S. 612, discussed more fully under point A of this argument, while not containing any express language alluding to the doctrine of frustration *eo nomine,* nevertheless is clearly based on the doctrine as is apparent from a reading of the whole opinion. The following language at p. 619 contains the *ratio decidendi:*

> "* * * and since such enjoyment and use were materially interrupted and prevented by the interference of the law, or of lawful public authority, to which both parties were amenable, the lessees, it seems to the court, ought to be protected against liability for the rent. * * *"

In *Omnia Co.* v. *United States,* 261 U. S. 502, this court, in speaking of the requisition by the government, for war purposes, of the entire production of a steel manufacturer,

rendering impossible and unlawful of performance an outstanding contract between a manufacturer and a customer, held that the customer's rights were frustrated by the government's lawful action. This court at p. 512 quotes from *The Frankmere*, 262 Fed. 819, as follows:

> "* * * the contract was thereby frustrated when the government took possession of the ship, and the rights of the charterer were absolutely ended and terminated, * * *."

The following additional authorities are cited in support of the application to the case at bar of the doctrine of frustration involving leaseholds: *Deibler* v. *Bernard Bros. Inc.*, 385 Ill. 610, 53 N. E. (2d) 450; *Wood* v. *Bartolino*, 48 N. M. 175, 146 Pac. (2d) 883; *Lloyd* v. *Murphy*, 25 Cal. (2d) 48, 153 Pac. (2d) 47; *Colonial Operating Corp.* v. *Hannan Sales & Service*, 265 App. Div. 411, 39 N. Y. S. (2d) 217; *Byrnes* v. *Balcom*, 265 App. Div. 268, 38 N. Y. S. (2d) 801, affd. 290 N. Y. 730, 49 N. E. (2d) 1004; *First National Bank of New Rochelle* v. *Fairchester O. Co.*, 45 N. Y. S. (2d) 532; *Fisher* v. *Lohse*, 42 N. Y. S. (2d) 121; *Mutual Life Ins. Co. of N. Y.* v. *Lester Pianos, Inc.*, 42 N. Y. S. (2d) 350; *Direct Realty Co.* v. *Birnbaum*, 46 N. Y. S. (2d) 435; *Conklin* v. *Silver*, 187 Ia. 819, 174 N. W. 573, 7 A. L. R. 882; *Coogan* v. *Parker*, 2 S. C. 255; *Bayly* v. *Lawrence*, 1 S. C. L. 499; *A. L. Young Mach. Co.* v. *Lee Loader & Body Co.*, 218 Ill. App. 427; *Morgan* v. *Cook*, 213 Ill. App. 172; *Levy* v. *Johnston & Hunt*, 224 Ill. App. 300; *Roxford Knitting Co.* v. *Moore & Tierney* (C. C. A. 2d) 265 Fed. 177; *The Tay Salmon Fisheries Co., Ltd.* v. *Speedie*, 1929 S. C. 593; *Krell* v. *Henry*, 2 K. B. 740.

In many of the foregoing cases, relief was denied to the tenant because it was not shown that the exigencies of war totally prevented the use of the demised premises, but only restricted the use to a more limited purpose or hampered the tenant in his continued conduct of business in the de-

mised premises or made the business less profitable to the tenant. In those cases, however, the inference is clear that had the tenant been totally deprived of the use of the premises, the lease would have been held terminated by the doctrine of frustration.

The following law review articles also support the point under discussion: 16 Tex. L. R. 47; 20 Tex. L. R. 710, 736-742; 56 L. Q. Rev. 173; 45 Yale L. J. 452; 42 Mich. L. R. 603, 610-611.

Williston on Contracts, (Rev. ed.) Vol. 6, Sec. 1955, entitled "Effect of fortuitous destruction of value of leased premises on obligation to pay rent," states at pp. 5485-5486:

> "That the tenant has been relieved, nevertheless, in several cases indicates the *gravitation of the law toward a recognition of the principle that fortuitous destruction of the value of performance by a circumstance wholly outside the contemplation of the parties may excuse a promisor even in a lease.* Any relief granted the tenant, however, should consist in *avoidance of the lease*, not simply of his covenant to pay rent. *He should be liable for the rent so long as he retains possession.*" (Italics ours.)

VII.

CONCLUSION.

The interpretation of the effect of the federal statute in the circumstances of this case is a question of public importance. Petitioner has claimed in the state court a right or immunity under a law of the United States and it has been denied to it. Jurisdiction so clearly warranted by the Constitution, Article III, sec. 4, and so explicitly conferred by the Act of Congress, sec. 237 (b) Judicial Code, needs no justification. In no other manner can a uniform

construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union. *St. Louis & Iron Mountain Ry.* v. *Taylor,* 210 U. S. 281, 293. The judgment should be reviewed.

Respectfully submitted,

J. GLENN SHEHEE,
Counsel for Petitioner.

RAYMOND F. HAYES,
Of Counsel.

APPENDIX.

The federal statute authorizing the condemnation referred to in the pleadings is known as Title II of the Second War Powers Act of March 27, 1942, Ch. 199, 56 Stat. 177. It amended the Act of July 2, 1917, entitled "An Act to authorize condemnation proceedings of lands for military purposes." (Ch. 45, 40 Stat. 241.)

The pertinent part of the last mentioned statute reads as follows:

> "The Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted:— * * * And provided further, That when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes, * * *."

The following is the amendment of March 27, 1942:

> "The Act of July 2, 1917 (40 Stat. 241), entitled 'An Act to Authorize condemnation proceedings of

lands for military purposes', as amended, is hereby amended by adding at the end thereof the following Section:

'Sec. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended.' "

The following is Executive Order No. 9321, made by the President on March 25, 1943:

"By virtue of and pursuant to the authority vested in me by Title II of the Second War Powers Act, 1942, approved March 27, 1942 (56 Stat. 177), the Attorney General is hereby authorized to exercise the authority contained in said Title II of the Second War Powers Act, 1942, to acquire, use, and dispose of any real property, temporary use thereof, or other interest therein, together with any personal property located thereon, or used therewith, that shall be deemed necessary for military, naval or other war purposes." (8 F. R. 3749.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 967

THE AUTOCAR SALES AND SERVICE COMPANY,
Petitioner,

vs.

A. G. LEONARD, F. H. PRINCE, AND D. H. REIMERS, NOT AS INDIVIDUALS, BUT AS TRUSTEES OF THE CENTRAL MANUFACTURING DISTRICT,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Certiorari to review the judgment of the Supreme Court of Illinois should be denied because:

(1) This Court lacks jurisdiction, no Federal question being involved.

The question as to the effect on the incidents of the landlord-tenant relationship, of the temporary taking and appropriation by the Government acting under the Second War Powers Act of the use of demised premises, is one of local law.

The Illinois Supreme Court has only applied its rule that where the condemnation merely carves out of a

long term lease a short term occupancy, the lessee's leasehold estate is not destroyed and his obligation to pay rent continues; only where the whole estates of the landlord and of the tenant are absolutely extinguished by a condemnation does the tenant's obligation to pay rent cease. (R. 60-69.)

Although petitioner asserts that some unspecified "immunity" against operation of these rules is contained in the Second War Powers Act, a reading of the Act (see Appendix to Petition) will disclose no trace or purport of such "immunity." Petitioner's claim of a Federal "immunity" is not even colorable.

(2) Even if it be assumed that a Federal question might have been involved, it was not properly raised or preserved in the State Courts.

Petitioner's answer (R. 40-1) did not specially set up or plead any Federal statute or "immunity" as a defense. The opinions of both the Appellate Court (R. 46-58) and the Supreme Court (R. 60-69) demonstrate that the case was presented as one to be decided under the common law of Illinois.

ARGUMENT.

The Sole Question Involved Is One of State Law.

The only question presented is whether petitioner, a lessee, is bound by its covenant to pay rent during the time that the exclusive possession and temporary use of the demised premises were taken by the Government under a condemnation proceeding pursuant to the Second War Powers Act (Ch. 199, Title II, Sec. 201, 56 Stat. 177, Title 50 U. S. C. A. App. Sec. 632). Petitioner is lessee of the premises for a term running from December 1, 1926 to November 30, 1946 (R. 5). The Government condemned the temporary use from March 11, 1943 to June 30, 1944, with the right to extend the term of the condemnation for additional yearly periods (R. 40, 41).

Petitioner asserts as a basis for jurisdiction of this Court under Sec. 237(b) of the Judicial Code, that the State Courts have denied it an "immunity" under the Second War Powers Act. However, the petition fails to quote any words or section of that Statute which even purport to create or to confer the supposed "immunity."

The particular immunity claimed in the present case is immunity from petitioner's covenant to pay rent. A mere reading of the Second War Powers Act shows that it does not attempt to declare that a tenant shall be relieved from performing his covenant to pay rent while the Government is in temporary possession. Petitioner has not been denied any immunity conferred by the Second War Powers Act because the Statute has not conferred any, and petitioner's contention that it has been denied one is not even colorable. As said by this Court in *Iowa* v. *Rood*, 187 U. S. 87, 92:

> "The mere fact that the plaintiff in error asserts title under a clause of the Constitution, or an Act of

> Congress, is not in itself sufficient, unless there be at least a plausible foundation for such claim. A party may assert a right, title, privilege or immunity without even color for such assertion, and if that were alone sufficient to give this court jurisdiction, a vast number of cases might be brought here simply for delay or speculative advantage."

The Second War Powers Act not having attempted to legislate on the effect of a taking thereunder upon existing landlord-tenant relationships, it follows, according to *Erie Railroad* v. *Tompkins*, 304 U. S. 64, 78, that "the law to be applied * * * is the law of the State."

In this case, the Supreme Court of Illinois merely confirmed the correctness of the assumption made by this Court in *United States* v. *General Motors Corporation*, 323 U. S. 373, that the tenant is still obligated to pay rent where less than the remainder of his term is taken in the condemnation proceedings. That case originated in a Federal District Court in Illinois and the rules laid down by the Court to determine the value of the tenant's occupancy are premised on the proposition that the tenant is bound to continue to pay rent during the time the Government is in temporary possession. There is nothing in the case of *United States* v. *Petty Motor Company*, cited by petitioner (decided February 25, 1946), which involved a complete taking of the entire interest of the tenants, which in any way modifies the *General Motors* case.

The cases cited by petitioner to sustain jurisdiction are not even remotely in point. Two of them involved assertions of rights under Federal Court judgments, while the others involved rights asserted under certain Acts of Congress. No Act of Congress in this case even purports to confer any rights or immunity on petitioner.

Even if the Assumption Be Made That This Case Might Have Involved a Federal Question, Petitioner Did Not Properly Raise or Preserve It in the State Courts.

In the jurisdictional statement at page 7, petitioner asserts that it specially set up and claimed an immunity under the Second War Powers Act in the Trial Court. That assertion is utterly without foundation. The record shows that all that petitioner did was to plead *inter alia* that because the Government had taken temporary possession for a stated period pursuant to unspecified "Federal Statutes," "defendant was evicted by paramount right from the entire premises, * * *" that the relation of landlord and tenant was thereby abrogated, and the "lease was terminated by operation of law" (R. 40-41). This is nothing more than an assertion that under the common law of Illinois it was not liable to respondents because of the *facts* pleaded.

Petitioner made no assertion in the Illinois Courts that it was claiming any right, privilege or immunity under the Second War Powers Act. This case has been presented through all three Courts of Illinois simply as one where the exercise of the sovereign power of eminent domain had interfered with the normal lessor-lessee relationships. Whether that power was exercised by the Federal or State sovereignity was a matter of no consequence. No special "immunities" or "privileges" were alleged or argued to have arisen because the condemnation was Federal rather than State.

The opinions of the Appellate Court (R. 46-58) and the Supreme Court (R. 60-69) demonstrate that petitioner never asserted any more than that because of the *fact* that the Government, acting within its statutory authority, had condemned a portion of the leasehold, petitioner was not

liable to pay rent. Petitioner never asserted in the State Courts that the Second War Powers Act itself conferred an immunity on petitioner. As stated by this Court in *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648, 653: "For aught that appears the State Court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question."

The averments in petitioner's answer do not meet the tests of "specially set up or claimed" laid down by this court. Thus, in *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648, 655, this Court said:

> "The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights, the Constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially' that is, unmistakably, this court is without authority to re-examine the final judgment of the State Court. This statutory requirement is not met if such a declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference."

Petitioner has printed in the record a complete copy of its petition for rehearing in the Supreme Court of Illinois (R. 71-74). Even if the petition for rehearing could be construed as raising a Federal question, it was obviously too late. It is well settled that Federal questions first presented in a petition for rehearing to the highest Court in the State are not timely raised unless the State Court actually entertains the petition and expressly passes upon the Federal questions (*Godchaux Co.* v. *Estopinal,* 251 U. S. 179, 181; *McMillen* v. *Ferrum Mining Co.,* 197 U. S. 343, 347).

But even the petition for rehearing does not show that petitioner was asserting that any provision of the Second

War Powers Act relieved it of its obligation to pay rent. All petitioner asserted was that the decision of the Supreme Court of Illinois was contrary to the common law decision of this Court in *Gates* v. *Goodloe,* 101 U. S. 612.

WHEREFORE, respondents respectfully pray that the petition for a writ of certiorari be denied.

HAROLD A. SMITH,
GEORGE B. CHRISTENSEN,
EDWARD J. WENDROW,
38 South Dearborn Street,
Chicago 3, Illinois,
Counsel for Respondents.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 967

THE AUTOCAR SALES AND SERVICE COMPANY,
Petitioner,

vs.

A. G. LEONARD, F. H. PRINCE AND D. H. REIMERS,
NOT AS INDIVIDUALS, BUT AS TRUSTEES OF THE CENTRAL MANUFACTURING DISTRICT,
Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Acting Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, The Autocar Sales and Service Company, asks a rehearing of its petition for a writ of certiorari, denied April 22, 1946, and shows:

Respondents' answer to the petition does not deny the merits of the defense asserted in the trial court, but is confined to two points, first, that no Federal question is involved, and, second, if a Federal question is involved, petitioner did not properly raise or preserve it in the State courts.

I.

Respondents have urged that the Second War Powers Act not having attempted to legislate on the *effect* of a taking thereunder, it follows, according to *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 78, that "the law to be applied * * * is the law of the State." It is noteworthy that respondents did not quote the full sentence. The language immediately preceding the quoted words is, "Except in matters governed by the Federal Constitution or by Acts of Congress,".

The true rule of the interpretation of federal statutes, viewed in the light of *Erie R. Co.* v. *Tompkins,* is stated in Sutherland Statutory Construction (3d ed. by Horack, 1943) Vol. 2, Ch. 46, sec. 4602, pp. 329-330:

> "Since the decision of *Erie R. Co.* v. *Tompkins,* the proposition has been generally accepted that there is no federal common law. However, it is quite certain that *there remains a federal common law of statutory construction.* Previous to the *Erie* case a federal common law of statutory construction was recognized by the federal courts, and so *the principles of statutory construction as developed by the federal courts will be followed in the interpretation of federal statutes.*" (Cf. *O'Brien* v. *Western Union Tel. Co.,* 113 F. (2d) 539 (CCA 1st, 1940); (1940) 54 Harv. L. Rev. 141.) (Italics ours.)

Thus it is clearly demonstrated that there *is* a federal question here involved. A local or state question is not involved.

II.

As to respondents' remaining contention that the federal question was not properly raised or preserved below, the statements contained in petitioner's Summary and Short

Statement of the Matter Involved and in its Jurisdictional Statements should be a sufficient answer. If there be any question on this point, the Court's attention is invited to *Sayward* v. *Denny*, 158 U. S. 180, where, in discussing the essentials of jurisdiction, it was said at p. 184:

> "Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved so that the state court could not have given judgment without deciding it; • • •"

The state court in this cause could not have given judgment for respondents without deciding that the taking under the federal statute did not operate to give petitioner the immunity from liability claimed by it in its answer in the trial court.

The order of April 22, 1946, should be vacated and a writ of certiorari granted.

Respectfully submitted,

J. GLENN SHEHEE,
Counsel for Petitioner.

RAYMOND F. HAYES,
Of Counsel.

(2)

IN THE

SUPREME COURT OF THE UNITED STATES

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Respondents.

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING AND PROFFERED SECOND PETITION FOR REHEARING.

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NOT AS INDIVIDUALS, BUT AS TRUSTEES OF THE CENTRAL MANUFACTURING DISTRICT,
Respondents.

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING.

To the Honorable, the Acting Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes The Autocar Sales and Service Company, petitioner, and moves the Court for leave to file herein instanter its second petition for rehearing of its petition for a writ of certiorari, because of a change of circumstances as developed in the following proffered second petition for rehearing.

J. GLENN SHEHEE,
Counsel for Petitioner.

RAYMOND F. HAYES,
Of Counsel.

SECOND PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Acting Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, The Autocar Sales and Service Company, again asks a rehearing of its petition for a writ of certiorari, denied April 22, 1946, and shows:

Petitioner's first petition for rehearing in this Court was denied May 20, 1946.

On May 20, 1946, at the hour of 5:15 P. M., a notice was mailed to petitioner by the United States of America and Henry L. Stimson, Secretary of War, extending the term for the use of the condemned property for an additional yearly period beginning July 1, 1946 and ending June 30, 1947. This notice was received by petitioner's counsel at about 11:00 A. M. on May 21, 1946. The original notice so received is attached to the signed copy of this petition, and made a part hereof by reference. The remaining copies of this petition contain a printed copy of such notice.

The Supreme Court of Illinois, in its opinion below (R. 65), stated:

> "It does not appear that the United States has extended its term of occupancy for additional periods covering the entire remaining term of the lease or has appropriated the whole of such remaining term; and, until it does do so, there is no basis for any claim that the leasehold estate granted to appellant has ceased to exist or has been destroyed. Whether the lease would be terminated and appellant absolved

from liability thereunder in the event the government should so appropriate the whole of the remaining term of the leasehold estate, is a question not before us and upon which we express no opinion."

It is obvious, therefore, that the governmental appropriation of petitioner's leasehold (which formerly was viewed by the courts below as a "partial" taking) has now become a "complete" taking. The lease here involved expires by its terms on November 30, 1946 (R. 5), and the period of the taking has now been extended to June 30, 1947.

This new fact now brings this cause squarely within the law laid down in *United States* v. *Petty Motor Co.*, (Nos. 77-83, not yet officially reported, opinions delivered February 25, 1946).

Respondents, in their brief (p. 4) in opposition to the petition for a writ of certiorari, urged that the Supreme Court of Illinois merely confirmed the correctness of the assumption made by this Court in *United States* v. *General Motors Corporation*, 323 U. S. 373, that the tenant is still obligated to pay rent *where less than the remainder of his term is taken* in the condemnation proceedings. Respondents further urged at the same page that the *Petty Motor* case did not in anyway modify the *General Motors* case, because the *Petty Motor* case "involved a complete taking of the entire interest of the tenants."

Thus, it is clear that the change in circumstances which occurred May 20, 1946, makes the ruling of this Court in the *Petty Motor* case absolutely applicable to and determinative of the issue here presented. In addition to the language quoted from that case by petitioner at pp. 20-21 of its petition for certiorari, the following statements appear at p. 5 of the opinion:

"There was a complete taking of the entire interest of the tenants in the property. * * * We think the

> sounder rule under the federal statutes is to treat the condemnation of all interests in a leasehold like the condemnation of all interests in the fee."

The cases are legion which excuse the tenant from the payment of rent under the facts as they now exist. It should suffice to state the general rule laid down in 43 A.L.R. 1176:

> "The majority view is taken that when the whole of leased premises is taken under eminent domain proceedings this terminates the lease, and the tenant is under no liability to pay the rent accruing after this event."

In support of this rule numerous decisions are then cited by the annotator, including *Corrigan* v. *City of Chicago*, 144 Ill. 537, 33 N. E. 746.

It is submitted that this Court, in the exercise of a sound and just discretion, will not permit an aggrieved person to be deprived of a clear right to immunity from an asserted liability, merely because the fact that clarified the right to immunity arose after the trial court's judgment and while this Court still has ample jurisdiction to grant relief.

Wherefore petitioner prays:

1. That the orders of this Court entered April 22, 1946 and May 20, 1946, denying, respectively, petitioner's petition for certiorari and its petition for rehearing, be vacated and set aside.

2. That a writ of certiorari be granted.

3. That this Court

   (a) Reverse the judgment below; or

   (b) Reverse the judgment below and order the cause remanded to the appropriate State Court (which petitioner suggests would be the trial court, the reviewing State courts having only appellate

jurisdiction) with directions to reconsider the law of the case as applicable to the change in circumstances.

4. That such other and further relief may be granted as the Court may deem proper.

J. GLENN SHEHEE,
Counsel for Petitioner.

RAYMOND F. HAYES,
Of Counsel.

STATE OF ILLINOIS }
COUNTY OF COOK } ss:

J. GLENN SHEHEE, being first duly sworn, on oath deposes and says that he is counsel for The Autocar Sales and Service Company; that on May 21, 1946, at about the hour of 11:00 A. M., he received through the United States mails from the United States of America and Henry L. Stimson, Secretary of War, a "Notice of Election to Extend Term" the original of such notice, so received, being attached to and immediately following this affidavit, which is appended to the signed copy of the foregoing petition; that true printed copies of such notice are contained in the remaining copies of said petition.

J. GLENN SHEHEE.

Subscribed and Sworn to before me this 22nd day of May, 1946.

F. HRIZAK,
Notary Public.

(Notice follows)

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA
For the Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA, *Petitioner,* *vs.* 825,755 SQUARE FEET OF LAND AND FLOOR SPACE, etc. and ARTHUR G. LEONARD, *et al.*, *Defendants.*	No. 43 C 270

NOTICE OF ELECTION TO EXTEND TERM.

To:

Lester E. Slosburg, 39 S. LaSalle St. Chicago

Pritzker & Pritzker, 134 N. LaSalle St. Chicago

Hoyne, O'Connor, Rubinkam & Melaniphy, 77 W. Washington St. Chicago

Winston, Strawn & Shaw, 38 S. Dearborn St. Chicago

Brenner & McBride, 100 N. LaSalle St. Chicago

Hayes, Shehee & Quigley, 1 N. LaSalle St. Chicago

Goldburg & Weigle, 110 S. Dearborn St. Chicago

Edmund W. Burke, 100 N. LaSalle St. Chicago

Harold V. Snyder, 1 N. LaSalle St. Chicago

Hopkins, Sutter, Halls & DeWolfe, 1 N. LaSalle St. Chicago

NOTICE IS HEREBY given that the United States of America and the Secretary of War have determined and elected to extend the term for the use of the space in the Autocar Building described in the Petition for Condemnation here-

tofore filed herein for an additional yearly period beginning July 1, 1946 and ending June 30, 1947.

UNITED STATES OF AMERICA,
Petitioner

HENRY L. STIMSON
Secretary of War

By: J. ALBERT WOLL
United States Attorney

By: ARTHUR A. SULLIVAN
Special Assistant to the United States Attorney

Dated: May 20, A.D. 1946

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

KATHRYN GRODSON, being first duly sworn on oath deposes and says that she personally mailed a true and correct copy of the above Notice by enclosing same in properly addressed envelopes to the above named attorneys, at their respective addresses, and depositing these envelopes in the United States Mail Chute at 111 West Washington Street, Chicago, Illinois on the 20th day of May, A.D. 1946 at 5:15 o'clock P.M.

KATHRYN GRODSON

Subscribed and Sworn to before me this 20th day of May, A.D. 1946.

MARGARET WARGOS
Notary Public.

(Notarial Seal)